Smith v. The Abandoned Vessel Doc. 110

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH Plaintiff	§	
	§	
	§	
V.	§	CIVIL ACTION H-07-784
	§	
THE ABANDONED VESSEL, ET AL. Defendant.	§ § §	

PLAINTIFF NATHAN SMITH'S MOTION TO AMEND THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

COMES NOW, Plaintiff, Nathan Smith ("Smith"), and files this Motion to Amend the Court's Findings of Fact and Conclusions of Law and Judgment under Rule 52(b), Fed. R. Civ. P., and would show the Court as follows:

I. INTRODUCTION

Smith requests the Court reconsider and amend its Conclusions of Law ("Conclusions") that (1) Smith is not entitled to a declaration of his right to title to any alleged abandoned vessel under the law of finds, because Smith did not prove he discovered an abandoned shipwreck and did not reduce anything from his discovery to his possession (Conclusion Nos. 173-180), and (2) Smith is not entitled to a salvage award because Smith did not bring the Court some portion of the ship to establish Smith's efforts have contributed to any successful salvage of lost property (Conclusion Nos. 193-202).

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It is very clear that the Court carefully considered the evidence and made Findings and Conclusions the Court believed warranted based on the evidence. Smith asks the Court to make a fresh consideration of the evidence of the existence of the vessel while considering authority suggesting that actual possession of the ship or parts of it are not necessary for an award under the law of finds or salvage. The Court should amend its Conclusions because (1) Smith has provided sufficient evidence of the vessel's existence that, when combined with the maritime law's timeless encouragement of industrious persons to save maritime property, warrants a conclusion that the vessel probably exists at the location indicated by Smith and the vessel should be saved; and (2) actual possession of a piece of the ship is not required for Smith to have constructive possession of the ship under the law of finds and to have contributed to the success of saving the vessel under the law of salvage.

II. ARGUMENT

A. Sufficient evidence exists warranting a conclusion that the vessel probably exists at the location indicated by Smith and the vessel should be saved.

Smith has taken every step appropriate and lawful to protect his interests, to claim the vessel, and to salvage it. He may still do so, but now faces possible interference with those efforts by others. Smith asks that his time and effort in locating the vessel, and in identifying appropriate and well qualified people to perform the salvage and obtaining their commitment to help, be protected. If he is right,[1] and the vessel is saved, then the purposes of the maritime law in encouraging saving maritime property will have been served. If he is wrong, and the vessel is not there, only Smith and his investors suffer any loss.

The evidence warrants the conclusion that the vessel is probably at the location identified by Smith. Plaintiff's Exhibits 8A and 8C are close up images of the vessel location by satellite, highlighted by Smith to show the shape of the vessel. As the Court noted in its Findings 27 and 28, Smith consulted with a Barkentine reconstruction expert, Rawls, in Michigan and a magnetometer company, BMC, and provided them with images of the vessel. Those conversations reinforced Smith's belief that he had found a vessel at the location depicted in Plaintiff's Exhibits 8A and 8C. The satellite images show the shape of a Barkentine vessel, albeit over a much larger area than the vessel could be. This can be explained by expansion of the clay soil in the area. Most persuasive, though, are the metal detector readings on three separate occasions showing gold and silver. Smith testified there is no explanation for such readings other than the existence of gold and silver. Intervenor's offered no evidence to the contrary to explain these readings. And, while the vessel is not exactly where the legend says

[1] The Court has noted already that Smith genuinely believes in his own mind that he actually has discovered the resting place of an ancient shipwreck (Conclusion No. 207).

it would be, it is in the area of the legend and history. The evidence is certainly more than coincidental and merits further inquiry.

The law protects "persons who actually endeavor to return lost or abandoned goods to society as an incentive to undertake such expensive and risky ventures." *Treasure Salvors, Inc. v The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 572-73 (5th Cir. 1981). Smith has done that. This is not a case where protection is unwarranted because a person has simply discovered property but done nothing to actually retrieve it. *See Treasure Salvors, Inc.*, 640 F.2d at 572-73. Smith has been to the site four times, he has filed suit against the vessel, he has sought a permit from the Corps of Engineers to begin salvage operations, he has people willing to assist in the salvage, and he is monitoring the site. Under the circumstances of this case, Smith's efforts should be protected.

Smith requests the Court make the following Finding:

> The Court finds the vessel probably exists at the location indicated by Smith, and the vessel should be saved. The satellite images show the shape of a Barkentine vessel, albeit over a much larger area than the vessel could be. This can be explained by expansion of the clay soil in the area. Most persuasive, though, are the metal detector readings on three separate occasions showing gold and silver. Smith testified here is no explanation for such readings other than the existence of gold and silver. Intervenor's offered no evidence to the contrary to explain these readings. And, while the vessel is not exactly where the legend says it would be, it is in the area of the legend and history. The evidence is certainly more than coincidental and merits further inquiry.

Additionally, Smith requests that the Court delete the entirety of Conclusion No. 177, that portion of Conclusion No. 179 which states Smith has not proven that he has discovered an abandoned shipwreck, and Conclusion Nos. 200, 201, and 207 to the extent such Conclusions state Smith has not found the vessel or contributed to the success of its salvage.

B. Actual possession of a piece of the ship is not required for Smith to have constructive possession of the ship under the law of finds and to have contributed to the success of saving the vessel under the law of salvage.

The Court's Conclusions regarding Smith's right to a declaration of title and a salvage award are premised, to a large degree, on the proposition of law that a person seeking title under the law of finds or a would-be salvor must have actual possession of a piece of the ship or its cargo. Smith requests the Court consider the following authorities, where actual possession was not required.

1. Actual possession of a piece of the ship or cargo is not required under the law of finds.

In Conclusion of Law No. 152, the Court correctly sets forth the three elements of the law of finds as: (1) intent to reduce property to possession; (2) actual *or* constructive possession of the property; and (3) the property is either unowned or abandoned. Conclusion No. 152 (emphasis added). The Court concluded that Smith satisfied elements 1 and 3, but not element 2. Conclusion Nos. 166, 169 & 179. Accordingly, the Court concluded Smith was not entitled to a declaration of right to title under the law of finds. Conclusion No. 180.

Conclusion No. 180 is premised on Smith not having proven that he has discovered an abandoned vessel, which is addressed in part A, above, and the legal principle that a claimant must actually reduce the property to his *physical* possession. Actual physical possession is not required.

As the Court stated in Conclusion No. 152, the second element of finds is "actual *or constructive possession* of the property." (emphasis added). If actual possession was required, the law would not allow an award based on constructive possession. So, something less than actual possession must be sufficient.

"Constructive possession is generally defined as 'knowingly having both the power and intention at a given time to exercise dominion or control over the property.'" *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562, 1566 (S.D. Fla. 1983) (quoting *United States v. Cousins*, 427 F.2d 382, 384 (9th Cir. 1970)), *aff'd*, 758 F.2d 1511 (11th Cir. 1985). Smith has the power and intention to exercise dominion and control over the property. The Court has already concluded Smith has the intention to reduce the property to his possession. *See* Conclusion Nos. 168 & 169. The evidence shows Smith has the power to exercise dominion and control over the vessel.

Since the vessel is in the navigable waters of the United States, Smith has the power to save the vessel.

Smith has made an application with the Corps of Engineers to conduct salvage operations and the Corps has determined it has jurisdiction. No one else has made any application. Once the permit is issued, Smith has a reputable salvage company ready to begin salvage and the project manager of the Titanic salvage operation ready to assist.

Accordingly, Smith has the power and intention to exercise dominion and control over the vessel. Under the unique circumstances of this case, Smith has constructive possession.

Actual possession of the ship or a part of it is not required.

In *Rickard v. Pringle,* 293 F. Supp. 981 (E.D.N.Y. 1968), two salvors asserted conflicting claims to the propeller of the Acara, a vessel which sank sixty years prior to Rickard's discovery of it. *See Rickard*, 293 F. Supp. at 983. Rickard began his salvage operations first, but left the site to make arrangements to bring in the necessary machinery to raise the property. *See Rickard*, 293 F. Supp. at 983. While Rickard was away, Pringle moved in and dragged the propeller away, raised it, and sold it. *See Rickard*, 293 F. Supp. at 983. The Court granted ownership of the salvaged property to Rickard even though he did not have a piece of the vessel, because Rickard was the first finder lawfully and fairly appropriating it and reducing it to his possession, with the intention to become its owner. *See Rickard*, 293 F. Supp. at 983.

Smith requests the Court amend Conclusions 175 through 180 to delete any conclusion that Smith does not have possession of the vessel and is not entitled to a declaration of right to title to the abandoned vessel under the law of finds and to enter the following amended Conclusion:

> Smith has the power and intention to exercise dominion and control over the vessel. The Court has already concluded Smith has the intention to reduce the property to his possession. *See* Conclusion Nos. 168 & 169. The evidence shows Smith has the power to exercise dominion and control over the vessel.
>
> Since the vessel is in the navigable waters of the United States, Smith has the power to save the vessel.
>
> Smith has made an application with the Corps of Engineers to conduct salvage operations and the Corps has determined it has jurisdiction. No one else has made any application. Once the permit is issued, Smith has a reputable salvage company ready to begin salvage and the project manager of the Titanic salvage operation ready to assist.
>
> Accordingly, Smith has the power and intention to exercise dominion and control over the vessel. Under the unique circumstances of this case, Smith has constructive possession.
>
> Actual possession of the ship or a part of it is not required.
>
> Accordingly, the Court finds as a matter of law that Smith is entitled to a declaration of right to title of the abandoned vessel.

2. Actual possession of the ship or a part of it is not necessary to show success under the law of salvage.

In Concluson No. 182, the Court correctly sets forth the three elements of salvage: (1) a marine peril; (2) voluntary service; and (3) contribution to the success of the operation. Conclusion No. 182. The Court concluded that Smith satisfied elements 1 and 2, but not element 3. Conclusion Nos. 189, 191 & 201. The Court concluded: "In a case such as this involving an alleged sunken treasure ship, this showing no doubt is made by bringing before the Court some portion of the *res* or fruit of the salvage operation." Conclusion No. 195 (citations omitted). The Court notes that it did not locate, and Smith did not present, any case in which a salvage award was granted to a potential salvor who did not present a piece of the vessel or an artifact. Conclusion No. 195 n.13. However, in Conclusion Nos. 150, 170, 171, 196 & 201 n.15, the Court cites *Hener v. United States*, 525 F. Supp. 350, 351 (S.D.N.Y. 1981), a case in which potential salvors that neither recovered nor located any property were given the right to attempt to conduct salvage operations. Smith seeks the same right.

In *Hener*, three competing potential salvors, the Hener Group; the Ocean Group; and the American Group, sought the right to attempt to salvage silver that was dumped from a barge into the Arthur Kill river channel in 1903. *Hener*, 525 F. Supp. at 352. The majority of the silver was salvaged in 1903, but the remaining silver was assumed to still be on the channel floor in 1981. None of the parties had possession of any silver or an exact location of any silver. *Hener,* 525 F. Supp. at 358-59. Nevertheless, the Court declared that the Ocean Group was "entitled to search for silver at the site believed by Robert Hooper to be the original excavation (the 'Hooper site') and that the American Group is entitled to act as salvor everywhere else in the Coast Guard's safety zone, except for a buffer zone extending 300 feet in all directions from the Hooper site." *Hener,* 525 F. Supp. at 352 & 359.

The court stated,

> Furthermore, although the law of salvage, like the law of finds, requires a salvor to establish possession over property before obtaining the right to exclude others, "possession" means something less in salvage law than in finds law. In the salvage context, only the right to compensation for service, not the right to title, usually results; "possession" is therefore more readily found than under the law of finds....[T]he would-be salvor's acts need not establish the most secure possession possible in the circumstances, but only a possession secure enough to warrant finding a right to perform service and a right to a just reward.

Hener, 525 F. Supp. at 357.

Applying these principles, the Court concluded "an adequate basis exists for finding that two of the competing groups of divers – the Ocean and American Groups – should be deemed salvors." *Hener,* 525 F. Supp. at 364. Since neither party had yet recovered a single pig of cargo, the Court placed both parties under a duty to perform within a specified period and to make reports to the Court. *Hener,* 525 F. Supp. at 366.

Much like the potential salvors in *Hener*, Smith has expended considerable time and resources in recovering the vessel. He researched the history of the Barkentine vessel; obtained historical maps; compared the historical maps to recent satellite images obtained from Google Earth and other sources; consulted with a

Barkentine reconstruction expert and a magnetometer company; traveled to the vessel location four times; took undisputed readings of the location with a metal detector showing gold and silver; requested a permit from the Corps of Engineers to excavate; and has a reputable salvage company ready to conduct salvage operations. All that remains is for Smith to begin excavating once a permit is issued. He has taken concrete actions towards saving the vessel.

Smith has demonstrated a possession secure enough to warrant finding a right to perform service and a right to a just reward. *See Hener,* 525 F. Supp. at 357. He should not be denied a current declaration of salvor on the basis that he has not reduced any artifact to his possession, when the impediment to obtaining such an artifact is a permit for which he is the only one who has made application.

If the Court does not grant Smith title to the vessel, then Smith requests the Court amend Conclusion No. 195 to state actual possession of an artifact is not required to be declared a salvor, and amend Conclusion Nos. 200 and 201 to recognize that Smith has contributed to the success salvage of the abandoned vessel. Smith asks the Court enter the following conclusions:

> Furthermore, although the law of salvage, like the law of finds, requires a salvor to establish possession over property before obtaining the right to exclude others, "possession" means something less in salvage law than in finds law. In the salvage context, only the right to compensation for service, not the right to title, usually results; "possession" is therefore more readily found than under the law of finds....[T]he would-be salvor's acts need not establish the most secure possession possible in the circumstances, but only

a possession secure enough to warrant finding a right to perform service and a right to a just reward. *Hener,* 525 F. Supp. at 357.

Applying these principles, the Court concludes an adequate basis exists for finding that Smith should be deemed salvor, even though he has not yet recovered the vessel or any of its cargo.

Smith has demonstrated a possession secure enough to warrant finding a right to perform service and a right to a just reward. *See Hener,* 525 F. Supp. at 357. He should not be denied a current declaration as salvor on the basis that he has not reduced any artifact to his possession, when the impediment to obtaining such an artifact is a permit for which he is the only one who has made application.

Accordingly, the Court determines that Smith is entitled to be declared salvor under the law of salvage and this Court shall maintain jurisdiction over this matter for purposes of determining an appropriate salvage award.

III. PRAYER

Plaintiff, Nathan Smith, requests that the Court grant this motion to amend findings of fact and conclusions of law and judgment, amend the Court's Conclusions, enter the conclusions requested, vacate the order dismissing Plaintiff's claims, amend the Court's judgment so as to grant Smith the relief requested, and grant Plaintiff such other and further relief which Plaintiff is entitled to receive.

Respectfully submitted,

/s/ Richard A. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Plaintiff Nathan Smith's Motion to Amend the Court's Findings of Fact and Conclusions of Law and Judgment* has been served upon the following:

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by electronic transmission and/or hand delivery on this the 11th day of May, 2009.

/s/ ***Richard A. Schwartz***
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